

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

PHILLIP DANIELS,	:	CIVIL ACTION NO. <b>3:CV-05-0830</b>
	:	
Plaintiff	:	(Judge Conaboy)
	:	
v.	:	(Magistrate Judge Blewitt)
	:	
DR. BOHINSKI, et al.,	:	
	:	
Defendants	:	

**REPORT AND RECOMMENDATION**

The Plaintiff, an inmate at the State Correctional Institution at Dallas, Pennsylvania, filed, *pro se*, this action pursuant to 42 U.S.C. §1983 on April 26, 2005. The matter is currently proceeding on an Amended Complaint filed on June 10, 2005. (Doc. 11). Pursuant to the prior Reports and Recommendations of the undersigned (Docs. 7 and 15) and the Memoranda and Orders of the District Court (Docs. 13 and 21), the only remaining Defendants in this matter are Defendant Dr. Bohinski and Defendant P.A. Cheryl Klisnewski. The Plaintiff's sole claim is under the Eighth Amendment for failure of Defendants to provide proper medical care after he fell in his cell. (Doc. 21, p. 7). The District Court dismissed the other Defendants and Plaintiff's other claims. Thereafter, the two remaining Defendants filed a Motion to Dismiss the Plaintiff's Amended Complaint, together with a supporting Brief, on December 19, 2005. (Docs. 25 and 26). Plaintiff did not file an opposition brief to Defendants' Motion.<sup>1</sup>

On January 25, 2006, Plaintiff filed a letter to the Clerk of Court wherein he seeks to withdraw the above-captioned civil rights action. (**Doc. 28**). Plaintiff indicates that he wishes to file

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<sup>1</sup>Since Plaintiff did not timely file his opposition brief, on January 11, 2006, the Court, *sua sponte*, allotted him additional time within which to do so. (Doc. 27).

a civil negligence suit in the Luzerne County Court of Common Pleas. We deem Plaintiff's filing as a Notice of Voluntary Dismissal under Rule 41(a)(1).

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, an action may be dismissed by the Plaintiff without order of Court by filing a notice of dismissal at any time before defendants file an answer or a summary judgment motion. In our case, the two remaining Defendants have not filed an answer to Plaintiff's Amended Complaint, nor have they filed a summary judgment motion. Rather, they have filed a Motion to Dismiss the Amended Complaint. Therefore, Plaintiff's request should be construed as a Rule 41(a)(1) notice of voluntary dismissal.

Based on the foregoing, it is respectfully recommended that Plaintiff's January 26, 2006 filing (**Doc. 28**) be deemed as a Rule 41(a)(1) notice of voluntary dismissal, and that this action be dismissed without prejudice.

s/ Thomas M. Blewitt  
**THOMAS M. BLEWITT**  
**United States Magistrate Judge**

**Dated: January 31, 2006**

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PHILLIP DANIELS,	:	CIVIL ACTION NO. 3:CV-05-0830
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Plaintiff	:	(Judge Conaboy)
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	:	
DR. BOHINSKI, et al.,	:	
	:	
Defendants	:	

**NOTICE**

**NOTICE IS HEREBY GIVEN** that the undersigned has entered the foregoing  
**Report and Recommendation** dated **January 31, 2006**.

Any party may obtain a review of the Report and Recommendation pursuant to  
Rule 72.3, which provides:

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within ten (10) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the

magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

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**s/ Thomas M. Blewitt**  
**THOMAS M. BLEWITT**  
**United States Magistrate Judge**

**Dated: January 31, 2006**